

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002
(202) 442-9091

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

NEWCOMB DAY CARE CENTER
and ANDREA CANNON
Respondents

Case No.: C-00-80016

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I. Introduction

On July 13, 2000, the Government served upon Respondents a notice of its intent to revoke their license to operate a child development facility located at 541 Newcomb Street, S.E. (the “Newcomb Street facility”). The Government alleged that Respondents were not in compliance with 29 DCMR 327.1, which requires all child development centers to comply with, inter alia, the District of Columbia Building Code. The Building Code, in turn, requires all buildings other than single family residences to possess a certificate of occupancy. 11 DCMR 3203.1. The Government alleged that the Department of Consumer and Regulatory Affairs revoked Respondents’ certificate of occupancy for the Newcomb Street facility on June 23, 2000, and, therefore, that Respondents did not comply with 29 DCMR 327.1. The Government now seeks to revoke Respondent’s license pursuant to 29 DCMR 306.1, which authorizes the

Government to revoke the license of any person not in compliance with any applicable regulation.

Respondents filed a timely request for a hearing pursuant to 29 DCMR 307.2. The hearing originally was scheduled for August 25, 2000, but, at Respondents' request, it was postponed to September 29, 2000. This administrative court has jurisdiction in this case pursuant to Reorganization Plan No. 4 of 1996, Mayor's Order No. 97-42, Mayor's Order No. 99-68 and Department of Health Organizational Order No. 99-24.

At the hearing, both the Government and Respondents were represented by counsel. The Government proffered Petitioner's Exhibit 200, which is hereby admitted into evidence. That Exhibit is a letter dated June 23, 2000 from the Department of Consumer and Regulatory Affairs ("DCRA") revoking the certificate of occupancy for the Newcomb Street facility. I heard no testimony, as Exhibit 200 was sufficient to satisfy the Government's burden of proof.

On October 11, 2000, I issued proposed findings of fact and conclusions of law (the "proposed decision") pursuant to 29 DCMR 307.4, and permitted the parties to file comments by October 20, 2000. Respondents filed comments on the due date; the Government did not. I have modified the proposed decision to address Respondents' comments, but I have not changed the originally proposed result. The Government's proposed revocation of Respondents' license is affirmed.

II. Findings of Fact

1. On June 23, 2000, Respondents had a license to operate a child development facility at the Newcomb Street facility.
2. The Department of Consumer and Regulatory Affairs revoked the certificate of occupancy for the Newcomb Street facility on June 23, 2000.

III. Conclusions of Law

Pursuant to 29 DCMR 306.1, the Department of Health may revoke a license to operate a child development facility if the licensee has violated any of the provisions of Chapter 3 of 29 DCMR.¹ One such provision, 29 DCMR 327.1, requires a licensee to conform to the Building Code. As noted above, the Building Code requires every building that is not a single-family residence to have a certificate of occupancy. 11 DCMR 3203.1. By establishing that the Newcomb Street facility does not have a current certificate of occupancy, the Government has proved, by the preponderance of the evidence, that Respondents are not in compliance with 29 DCMR 327.1, and, therefore, that 29 DCMR 306.1 permits revocation of Respondents' license.

¹ Although §306.1 states that the Government "shall be required" to revoke a license if it finds that a licensee has failed to comply with any regulation, other rules permit the Government to pursue less drastic alternatives, making it clear that the power to revoke a license is discretionary. See 29 DCMR 306.3 (permitting the Government to offer a licensee an opportunity to correct a violation); 29 DCMR 310.4 (permitting the Government to seek civil penalties as an alternative sanction). Moreover, the applicable statute, D.C. Code § 6-3630, provides that the Government "may" revoke a license if a licensee fails to comply with an applicable regulation.

Respondents do not dispute that their certificate of occupancy has been revoked. They argue, however, that DCRA acted improperly in doing so. They state that they filed a timely request for a hearing with DCRA, but that agency has not yet held a hearing. At the hearing, they recognized that this administrative court has no jurisdiction to review DCRA's decision to revoke the certificate of occupancy, but argued that their license should not be revoked until after DCRA acts on their appeal.

The Government responds that the regulations do not permit Respondents to retain their license once the certificate of occupancy has been revoked. According to the Government, the lack of a certificate of occupancy necessarily means that Respondents are out of compliance with the Building Code and, therefore, out of compliance with §327.1

The Government's argument is correct. The regulations give this administrative court no authority to adjudicate any aspect of Respondents' dispute with DCRA. Rather, my only task is to determine whether Respondents presently are in compliance with 11 DCMR 3203.1, which requires that they possess a certificate of occupancy. They do not have a certificate, and, therefore, the Government's revocation of their license is proper.

In their comments upon the proposed decision, Respondents argued that I must decide whether DCRA's action was correct before I can rule on the Department of Health's proposed revocation of their license. This administrative court's jurisdiction is limited, however. Department of Health Organization Order No. 99-24 (December 17, 1999) authorizes the Office of Adjudication and Hearings to hold hearings "for all matters falling under the adjudicative

jurisdiction of organizational units within the Department of Health, or with the approval of the Director, other agencies.” Id., § IV.C.² Respondents’ challenge to DCRA’s revocation of their certificate of occupancy is not a matter within the jurisdiction of any organizational unit of the Department of Health, nor has the Director of the Department of Health given his approval for this administrative court to hear that challenge.³ Thus, contrary to Respondents’ argument, I have no authority to decide whether DCRA acted properly, nor can I require DCRA to grant Respondents an early hearing. Respondents must look elsewhere for a remedy if they believe that DCRA has acted improperly. My jurisdiction is limited to deciding whether Respondents are in compliance with 29 DCMR 327.1. As explained above, the Government has established that they are not.

To be sure, Respondents may suffer an unfair result if their appeal of DCRA’s action succeeds. Once their license to operate a child development facility is revoked, success on the appeal will not automatically reinstate it. To avoid an unfair disadvantage to Respondents, I will affirm the revocation of Respondents’ license but will permit Respondents to reopen this case and seek to vacate my order if they obtain a ruling that DCRA’s revocation of their certificate of occupancy on June 23, 2000 was improper.

² A copy of the Order is attached to this opinion.

³ The “Director’s approval” section of the Order is intended to permit this administrative court to adjudicate cases outside the Department of Health’s jurisdiction when authorized by a Memorandum of Understanding or other agreement with another agency. It does not, and could not, authorize the Director unilaterally to transfer authority over any case to this administrative court.

IV. Order

Based on the foregoing reasons and the entire record in this case, it is, this _____ day of _____, 2000:

ORDERED, that the Government's proposed revocation of Respondents' license to operate a child development facility is **AFFIRMED**; and it is further

ORDERED, that within 30 days of their receipt of a final decision from the Department of Consumer and Regulatory Affairs or from any court of competent jurisdiction that the June 23, 2000 revocation of Respondents' certificate of occupancy for the Newcomb Street facility was improper or unlawful, Respondents may file a motion to reopen this case and to vacate this order *nunc pro tunc*, thereby restoring their license subject to the Department of Health's decision upon any timely application for renewal of that license; and it is further

ORDERED, that, pursuant to D.C. Code §§ 6-3635 and 1-1510, judicial review of this order may be obtained by filing a petition for review with the District of Columbia Court of Appeals. Pursuant to D.C. App. R. 15(a), any such petition must be filed within thirty-five (35) days of the service date of this order stated below.

/s/ **10-24-00**

John P. Dean
Administrative Judge